



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

DAVID P. LITTELL
COMMISSIONER

MEMORANDUM

TO: Board of Environmental Protection

FROM: Beth Callahan, Project Manager, and Marybeth Richardson, Licensing Coordinator
Bureau of Land and Water Quality

RE: Christopher O. Bursaw and Todd Merolla Appeal of Natural Resources Protection Act
Approval #L-24420-4P-A-N, Michael E. & Dianne W. Traphagen, Southport

DATE: January 7, 2010

Statutory and Regulatory References: The applicable regulatory framework for this application is the Natural Resources Protection Act (NRPA), 38 M.R.S.A. §480-A to 480-FF and the Wetland and Waterbodies Protection Rules, Chapter 310. Procedures for appeals before the Board are outlined in the Department’s Rules Concerning the Processing of Applications, Chapter 2(24)(B).

Location: The project site is located off Cameron Point Lane on Townsend Gut in the Town of Southport.

Description: In Department Order #L-24420-4P-A-N, dated August 27, 2009, the Department approved the construction of a residential pile-supported pier that will include a seasonal ramp and float. The pier will measure 6 feet by 20 feet and will be constructed on four pilings. The ramp will be 3 feet wide by 40 feet long and the float will be 10 feet wide by 20 feet long.

Todd Merolla filed an appeal of the Department’s decision in a letter dated August 31, 2009; Christopher O. Bursaw filed an appeal of the Department’s decision in a letter dated September 5, 2009. The bases for the appeals are the appellants’ assertions that the Department erred in its findings with regard to existing and navigational uses, historic resources, habitat considerations, and coastal wetland considerations.

Existing and Navigational Uses and Historic Resources: One of the appellants asserts that the proposed project will create a greater amount of boat traffic in the area, will create a safety concern for swimmers around his pier, and will inhibit the use of his existing mooring.

The applicants sited the proposed project in a location that is more than 300 linear feet from the appellant’s property line. The United States Army Corps of Engineers (ACOE) reviewed the proposed project and considered aspects of navigation and surrounding pier systems. The ACOE did not identify any concerns and issued an approval for the project on March 5, 2009.

Both appellants contend that the proposed project will impact an historic shell midden. During review of the application, one of the appellants submitted a document entitled “The Cameron Point Excavation at Southport Island, Maine”, which states that an excavation was performed in 1963 and 1964. The

document does not state the exact location where the excavation was performed on Cameron Point, and the appellants did not submit additional documentation denoting the exact location.

By letter, dated December 10, 2008, the Maine Historic Preservation commission concluded that there are no historic properties affected by the proposed project. The applicants also submitted letters from the Tribal Historic Preservation Office of the Passamaquoddy Tribe and Penobscot Indian Nation that state, both of which state, in effect, that the proposed project will not have an adverse impact on cultural or historic concerns of the tribes.

Habitat Considerations: One of the appellants asserts that wildlife including rabbits, porcupines, skunks, red fox, squirrels, turtles, ospreys, moose, deer, turtles, and other plant and wildlife are present on the applicant's property and will be adversely affected by the proposed project.

The NRPA protects significant wildlife habitat, as defined under the law, and also aquatic and upland habitat in general. Pursuant to 38 M.R.S.A §480-B(10), a significant wildlife habitat is a habitat of one of the following types that is mapped by the Maine Department of Inland Fisheries and Wildlife (MDIFW) or is within any other protected natural resource such as coastal sand dune systems, coastal wetlands, significant wildlife habitat, fragile mountain areas, freshwater wetlands, community public water systems primary protection areas, great ponds, and rivers, streams or brooks.

Significant wildlife habitat includes the following: significant vernal pool habitat, inland and tidal waterfowl and wading bird habitat, shorebird feeding and roosting habitat, and seabird nesting islands as defined by MDIFW.

The majority of the species that the appellants list are not considered as rare, threatened, or endangered, do not have a corresponding habitat that is mapped or defined by MDIFW, and are not waterfowl, wading birds, or shorebirds; therefore, these species do not have a habitat that meets the above definition and are not afforded special protection by the NRPA. Of the species that the appellant lists, only high and moderate value Deer Wintering Area is considered significant wildlife habitat. The site does not contain a mapped high or moderate value Deer Wintering Area.

The Department determined that there are no mapped significant wildlife habitats associated with the project site according to the Maine Geographic Information Systems mapping database. Department staff also conducted a site visit to the project site on March 11, 2009. Department staff confirmed by first hand observation that there are no significant wildlife habitats present at the project site. Department staff further concluded that the proposed project would not have a significant impact to wildlife habitat in general on the project site.

Coastal Wetland Considerations: Both appellants contend that a practicable alternative exists that is less damaging to the environment than the proposed project. Appellants state that the applicants have the capability to use a public boat launch adjacent to the Southport Bridge on Townsend Gut. This potential option was not analyzed in depth by the Department as an alternative during its review of the proposed project. However, Department staff visited the site of the boat ramp on October 26, 2009 and determined that the landing is relatively small with only very short term temporary parking available; also it is quite close to an adjacent existing private pier. The launch area is approximately 10 feet wide.

The applicants did consider several other alternatives to the proposed project including nearby boat launching facilities and a marina. The applicants determined that these alternatives were not feasible due to restrictions at the investigated facilities.

Based upon information in the record originally, the Department found that the project represented the least environmentally damaging alternative that met the overall purpose of the project. In response to the appellants' argument on appeal, Department staff inspected the site of the public boat launch as a potential alternative and has concluded that, considering the practical constraints of the boat launch, the potential impacts of the proposed project on the coastal wetland are not unreasonable.

Other Considerations: The appellants state concerns related to construction of a residential structure and the cutting of vegetation in the shoreland zone and within proximity of a tributary stream.

The Department Order under appeal is for a residential pile-supported pier system. The applicants withdrew a proposal to construct a home which would have resulted in re-location of a stream prior to issuance of the Order. The applicants do not state in the application that cutting of vegetation is necessary to access the project site. Moreover, the applicants' response to the appeal states that no tree cutting is planned and the pier site will be accessed via an existing path that will be extended.

Regarding the shoreland zoning concerns raised by the appellants, the Town of Southport issued an approval for the project on February 26, 2009, which authorizes the activities within the shoreland zone.

Department Recommendation: After reviewing the appellants' arguments, and conducting a site visit to further evaluate the questions raised, the Department concludes that the applicant has met the requirements for an NRPA permit as described above. The Department recommends that the Board affirm the Department's decision to approve the proposed residential pile-supported pier with an associated seasonal ramp and float as referenced in Department Order # L-24420-4P-A-N.

Estimated Time of Presentation: 2 hours

**Appeal of Department Order
#L-24420-4P-A-N
INDEX TO MATERIALS**

1. PROPOSED BOARD ORDER
2. ORDER UNDER APPEAL
3. PROJECT LOCATION MAP / PROJECT PLANS
4. STATUTORY REFERENCES
5. APPEAL DOCUMENTS
6. APPLICANT'S RESPONSE TO APPEAL
7. MATERIALS SUBMITTED BY DEPARTMENT IN RESPONSE TO APPEAL
8. EXCERPTS FROM THE DEPARTMENT RECORD